FOR ARGUMENT

UNITED STATES SUPREME COURT

NO. 76-316

JOHN R. BATES

and

VAN O'STEEN

vs.

STATE BAR OF ARIZONA

BRIEF OF ROGER P. STOKEY
AS
AMICUS CURIAE IN
SUPPORT OF APPELLEE

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STATEMENT OF THE ISSUES:

The appellant has stated the issues as follows:

1. Does a total ban upon advertising by private attorneys, enforced by an integrated state bar and state supreme court, violate the First Amendment.

2. Does such a ban, originated by the American Bar Association and incorporated into a rule of the Arizona Supreme Court, violate the Sherman Act notwithstanding the state action exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943)?

STATEMENT OF THE CASE:

This case comes before the Court to review the action of the Supreme Court of Arizona which censured two (2) Phoenix lawyers for advertising their availability and charges in a newspaper. The case is admittedly designed to test the constitutionality of the rule against advertising.

ARGUMENT

SUMMARY OF ARGUMENT:

Oridinarily consideration of whether advertising by members of the Bar should be permitted assumes that advertising will be helpful to the public. The undersigned submits that (1) such advertising will rarely, if ever, be useful, (2) in most (perhaps all) instances it will be inherently misleading, and (3) hence advertising by lawyers is appropriately forbidden - not to protect lawyers but to protect the public. The Bar can appropriately decide that these facts and as a service to the public forbid advertising. The action will probably be misunderstood; nevertheless the Bar should take this stand. Taking an unpopular stand is not a new experience

for the Bar.

I. ADVERTISING OF LEGAL SERVICES WILL RARELY IF EVER BE USEFUL.

Choosing a lawyer is difficult at best. Three (3) illustrations demonstrate this point.

First, every lawyer knows the difficulty of recommending a lawyer to handle a problem. Before replying to a request for a recommendation he asks many questions to learn as much as possible about the particular matter. What kind of a case is it? What are the facts? How much is involved? What degree of experience or expertise is needed? What is the difficulty of the matter? What complications are likely to arise? What kind of person is the client? Even after getting answers a lawyer is usually reluctant to suggest someone because he knows the variety of

factors involved.

Second, Courts have recognized the difficulty of evaluating past legal services when they have ruled upon fees. It goes without saying that evaluating service yet to be rendered is more difficult then. The many factors the Courts regularly consider in passing upon fees is indirect recognition of the many factors which go into determining an appropriate lawyer to handle a particular matter.

Third, the difficulty of making appropriate selections for the judiciary shows the difficulty of making an appropriate selection of a lawyer. More than a law degree is wanted. More than a law degree plus honesty is wanted.

Advertising by its very nature oversimplifies the difficult task of selecting

a lawyer. Every experienced lawyer knows that one of the toughest problems of law is separating the simple from the complex, or in making complex appear simple. As Bar exams demonstrate, even recognizing the issues can be difficult. A lawyer knows that it may be cheapest to pay an apparently high hourly rate to get an expert who will make something simple. He knows of the botches created by lawyers who are not aware of complications. Who has not seen a will which was badly drawn by a lawyer? Unrecognized tax problems abound. Court cases are ineptly handled. Choosing a lawyer on a fee basis is an expensive right. The Bar is aware of the problem. It has an obligation to protect the public against such mistakes.

Consider for example, the ad of Bates & O'Steen - it reads in part:

"Divorce or legal separation-uncontested (both spouses sign papers) $175.00 plus $20.00 court filing fee".

An uncontested divorce can be a simple matter, but it may be a very complex problem. Should inexperienced laymen make the decision as to whether it is simple or complex? Should lawyers set up a system which can be a legal attractive nuisance? Should the Bar rely on the lawyers who place the ads to tell the persons attracted that although a divorce may be uncontested, and although both spouses may be willing to sign the papers, it is not simple because of children or because of property, or because of some other factor. Yet an uncontested divorce is the first item in the advertisement.

II. ADVERTISING BY LAWYERS IS INHERENTLY MISLEADING TO LAYMEN.

Advertising by lawyers is inherently misleading to laymen. Although lawyers know that fees and hourly rates are only one factor in choosing a lawyer, the layman doesn't. Who would choose a surgeon for difficult surgery by competitive bidding? How does a layman choose a good dentist? Why are courts concerned about the quality of lawyers practicing before them? Why is the Bar concerned about continuing education?

An advertisement, however, necessarily suggests that the professional services of a lawyer should be chosen on the basis of the facts set forth in the ad. The ad may demonstrate the ability of the copy writer. It can tell the reader little or nothing about the person who will handle his case. It will suggest that certain factors are important, when

all lawyers know that many factors are important.

Even if an instance can be found in which an ad is not misleading, because the case described is in fact simple, it will suggest that other problems are also susceptble to such simple analysis. They are not.

III. ADVERTISING BY LAWYERS IS APPROPRIATLY FORBIDDEN.

A State Bar or a State Supreme Court may reasonably conclude that advertising by lawyers rarely if ever serves a purpose, is ordinarily misleading to laymen, adds to costs and fees, and hence is appropriatly forbidden.

The financial aspect of advertising has been ignored in this brief. However it is self evident that (1) large firms, whatever their merits, can by

pooling the efforts of lawyers get more expensive agencies and presumably more effective advertising (2) advertising will increase the cost of practicing law (3) advertising will add to legal fees. The public will pay more for the same service.

The difference in cars may be demonstrated by advertising. In such cases the public is educated. But advertising will not educate the public as to the difference between lawyers.

It is irrelevant that forbidding advertising by lawyers is misunderstood. The legal profession has an obligation to the public. This is well demonstrated by the attorney-client privilege, which belongs to the client, not to the attorney. The law gets blamed, but the public gets the benefit.

CONCLUSION:

Accordingly, the action of the Court below should be affirmed.

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CERTIFICATE OF SERVICE

December 16, 1976

I, Roger P. Stokey, certify that I served this Brief of Roger P. Stokey as Amicus Curiae by mailing copies thereof to William C. Camby, Jr., Esq., and John P. Frank, Esq.

Roger P. Stokey